PARTIAL-BIRTH ABORTION BAN/Substitute (Daschle)

SUBJECT: Partial-Birth Abortion Ban Act of 1997 . . . H.R. 1122. Daschle substitute amendment No. 289.

ACTION: AMENDMENT REJECTED, 36-64

SYNOPSIS: As introduced, H.R. 1122, the Partial-Birth Abortion Ban Act of 1997, will enact criminal and civil penalties for any person who "partially vaginally delivers a living fetus before killing the fetus and completing the delivery." An exception will be provided if a partial-birth abortion is necessary to save the life of the mother and no other procedure will suffice. The language is identical to the language of H.R. 1833 from last Congress, which President Clinton vetoed (see 104th Congress, 1st session, vote Nos. 594-596 and 104th, 2nd session, vote No. 301).

The Daschle substitute amendment would make it unlawful for any "physician to abort a viable fetus unless the physician certifies that the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health." The term "grevious injury" would be defined as a "severely debilitating disease or impairment caused by the pregnancy or an inability to provide necessary treatment for a life-threatening condition" but not "any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated." No criminal penalties would be authorized; the Justice Department could file civil charges. For a first offense, a fine of up to $100,000 could be imposed, and for a subsequent offense a fine of up to $200,000 could be imposed. On a first offense, a case could be referred to a State medical licensing authority for the suspension of a medical license; for a second offense, a case could be referred to a State medical licensing authority for the revocation of a medical license.

Those favoring the amendment contended:

We personally oppose most abortions, but we also believe that the Government's role in restricting them should be very limited. We well remember the days when abortion was illegal, and women went to great, and dangerous, lengths to procure them anyway.

(See other side)

YEAS (36)

Republicans (2 or 4%)	Democrats (34 or 76%)	
Collins	Akaka	Kerrey
Snowe	Baucus	Kerry
	Biden	Kohl
	Bingaman	Landrieu
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Lieberman
	Cleland	Mikulski
	Daschle	Moseley-Braun
	Dodd	Murray
	Durbin	Reed
	Feingold	Robb
	Graham	Rockefeller
	Harkin	Sarbanes
	Inouye	Torricelli
	Johnson	Wellstone
	Kennedy	Wyden

NAYS (64)

Republicans (53 or 96%)		Democrats (11 or 24%)
Abraham	Hutchinson	Boxer
Allard	Hutchison	Breaux
Ashcroft	Inhofe	Conrad
Bennett	Jeffords	Dorgan
Bond	Kempthorne	Feinstein
Brownback	Kyl	Ford
Burns	Lott	Glenn
Campbell	Lugar	Hollings
Chafee	Mack	Lautenberg
Coats	McCain	Moynihan
Cochran	McConnell	Reid
Coverdell	Murkowski	
Craig	Nickles	
D'Amato	Roberts	
DeWine	Roth	
Domenici	Santorum	
Enzi	Sessions	
Faircloth	Shelby	
Frist	Smith, Bob	
Gorton	Smith, Gordon	
Gramm	Specter	
Grams	Stevens	
Grassley	Thomas	
Gregg	Thompson	
Hagel	Thurmond	
Hatch	Warner	
Helms		

NOT VOTING (0)

Republicans (0)	Democrats (0)

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

The right to choose is a very personal, private choice, and no matter what the law may say some women are going to choose to abort. We cannot stop this practice, but that does not mean we should encourage it either. Most abortions are in the first trimester and are of unintended pregnancies. If young women had better access to contraceptives and more educational and career opportunities, those pregnancies could be avoided in the first place. Once women are pregnant, if better social services are provided, fewer of them will opt to abort. Like most Americans, we are bothered by later-term abortions. When a fetus is closer to being able to live separately from its mother, it begins to have rights. The Daschle amendment has been offered as a substitute for this bill in an effort to protect those rights of viable fetuses.

We have always been pro-choice, but we have never been pro-abortion. When our colleagues first described the details of so-called partial-birth abortions last Congress, we were repulsed. Therefore, after voting to uphold President Clinton's veto of partial-birth abortions, we began to seek out the advice of medical and constitutional experts to see if some sort of common ground could be found. The first conclusion that we reached was that partial-birth abortions are no more brutal than other forms of late-term abortions. For instance, in dilation and evacuation abortions live fetuses are dismembered piece-by-piece in the womb, and in chemical and saline abortions they are slowly and painfully poisoned to death. The next conclusion we reached was that we do not have the constitutional authority to restrict abortions on fetuses that are not viable. Because most partial-birth abortions are performed before a fetus reaches viability, a complete ban on partial-birth abortions is unconstitutional.

From these two conclusions we set out to design a bill that would give some protection to viable fetuses from all forms of late-term abortions. The result of that effort is the Daschle amendment. Under the Daschle amendment, a doctor would need a very legitimate reason before aborting a viable fetus. He would have to certify that the woman's life was in danger or that she faced a risk of grevious physical injury from the pregnancy. If he gave a false certification he would face very severe penalties. The main difference between this amendment and the previous amendment is that the previous amendment would have allowed a much broader health exception. Our colleagues tell us that there is little practical difference between the two amendments because in both cases the doctor himself would be relied on to say whether the abortion were necessary. They quote Dr. Hern, who wrote the most widely used abortion manual in America, as saying that he would certify that every pregnancy carried the risk of grevious injury to the woman. In response, we tell them that if he were to do that he would be found guilty by a jury, heavily fined, and lose his license to practice medicine. The intent of this amendment obviously is not to say that every pregnancy poses grevious risks, as Dr. Hern contends; it clearly is intended to apply to only the most severe problem pregnancies. Judges and juries will be able to make the appropriate distinctions. Further, we note that in the underlying legislation an exception is made for the life of the mother. If a doctor uses that exception because he says he believes that it is necessary and no other procedure will suffice, it will be possible to take him to court and to try to prove him wrong. Again, a judge and a jury will be able to decide if he has misused that exception.

Another major difference between the Daschle amendment and the Feinstein amendment is that the Daschle amendment recognizes that in late-term abortions appropriate efforts should be taken to deliver a viable fetus. We agree with those of our colleagues who say that when conditions arise late in pregnancy that make it necessary, for the sake of the woman, to end that pregnancy, that does not mean that the fetus must be destroyed. Appropriate steps should be taken to deliver a viable fetus, as long as those steps are consistent with protecting the woman's life and health. Therefore, we have included statements to that effect in the findings of the Daschle amendment. Our colleagues complain that the language of findings is nonbinding, but we think it is useful in clarifying legislative intent.

Right now, though, the issue is moot, because our pro-life colleagues, and many of our pro-choice colleagues, will reject the Daschle amendment in favor of the language of the underlying bill. Still, we are encouraged by some of the comments of the opponents of this amendment. They have indicated that they are willing to work with us in the future on this issue. Perhaps someday soon comprehensive Federal restrictions on late-term abortions will be enacted. Though we know we will not prevail, we urge the adoption of this amendment.

Those opposing the amendment contended:

Argument 1:

Our colleagues have made an honest effort to find common ground, but they have unfortunately come up far short. Perhaps their effort may have had better results if they had consulted with the sponsor of this legislation, or any of the supporters of this legislation, in writing their amendment. Instead, they drafted "compromise" language absent any input from those Senators with whom they say they are attempting to reach agreement. With all due respect, this method of proceeding was virtually guaranteed to fail from the outset.

Though we have only been presented this supposed alternative to the underlying bill a few hours ago, a cursory reading shows that it has several fatal flaws. Many of those flaws it shares in common with the previous amendment. The first two flaws are that it would leave two key determinations to the sole discretion of the abortionist. First, the abortionist, and the abortionist alone, would decide whether or not an unborn baby was viable. Our colleagues tell us that a court could overrule him, but their statement does

little good when their amendment makes no effort to define viability, and current law, as set forth in Planned Parenthood of Central Missouri versus Danforth, clearly states that the abortionist decides. In that case, the Court specifically ruled that, "The determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." In other words, under the Daschle amendment, if an abortionist said a baby was not viable, the Government could take him to Court, but the Court would have to rule based on the abortionist's judgment. The Government would have no case unless the abortionist said the baby was viable.

The second and related problem is that the amendment, like the previous amendment, would leave it entirely up to the abortionist to determine if the amendment's life or health exceptions allowed the abortion of a viable baby. All he would have to do is certify "that the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health." Every pregnancy carries some risk, though extremely minimal, of grievous injury to a woman's physical health. The Daschle amendment would not define the level of "risk" that would justify an abortion of a viable baby, so anyone performing any late-term abortion could just certify, accurately, that they believed that it posed a risk of grievious injury to the woman's physical health. Our colleagues have claimed that their amendment is the same as the underlying bill in that the underlying bill contains a life-of-the-mother exception. The difference that they do not mention is that there is no certification procedure in the underlying bill; if a doctor performs a partial-birth abortion and says that it was necessary to save the life of the mother and no other procedure would have sufficed, a judge and a jury will decide if he is right. Under this bill, all the abortion provider will have to do is say it was necessary, and that statement will have to be taken as a dispositive statement of fact by a judge and jury. It frankly is not any restriction at all. The only possible way it will ever result in any restriction is if the abortionist himself says that in his judgment he broke the law.

The main difference between this amendment and the previous amendment is that it would tighten the definition for health exceptions. As we have already explained, this change does not make any difference because it does not define the level of risk and it puts the abortionist completely in charge of deciding if an abortion is legal. Still, we appreciate our colleagues' effort in trying to narrow the circumstances under which late-term abortions would be legal. With that said, we must also note that their tightened definition is itself problematic. It limits exceptions to "physical" problems. The Supreme Court, however, has already said that mental and other factors must be considered when allowing late-term abortions. Our colleagues have further muddied the waters by stating that they think that severe mental problems usually have physical manifestations, and thus late-term abortions might be allowed due to mental problems. We are not at all pleased with the Court's health exceptions for abortion, nor are we pleased with our colleagues' vague comments on what would actually be banned using the word "physical."

This amendment also contains a very large step in the right direction in that it states that the right to an abortion is not the same thing as the right to kill a fetus.Throughout this debate hundreds of obstetricians and neonatoligists have written us on precisely this point. Over and over, they have said that in second and third trimester abortions the baby does not have to be killed in those rare cases when separation from his or her mother is necessary. For second trimester babies, the result is soon death, but what is wrong with letting those children die naturally and humanely? Why not give comfort instead of employing brutal methods of abortion? For a third trimester baby, why not give that baby a chance to live? We wish that our colleagues had done more than acknowledge that late-term abortions do not require the babies to be killed--they could have put that language into the operative section of the bill, requiring doctors to save those babies when possible. Still, we are very pleased that this language has been added.

We think that many of our colleagues are sincere in their desire to limit late-term abortions. However, the Daschle amendment is deeply flawed. As columnist George Will accurately characterized it, it is a proprosal "that is impossible to violate." It would not stop one late term abortion. Its one real effect, because it is a complete substitute for the bill, is that it would keep partial-birth abortions legal. In the future, after we pass the needed ban on partial-birth abortions, we will gladly work with our colleagues to restrict all late-term abortions. For now, though, this deeply flawed proposal must be rejected.

Argument 2:

The Daschle amendment would unconstitutionally restrict the right to choose. We are not concerned with the self-certification procedures; instead, we are concerned that the certifications that doctors would be required to make are unconstitutional. For example, if a woman found out that she was carrying a severely deformed fetus that would soon die after birth, after leading a short and painful life, she could not get an abortion under this amendment. A woman would very likely suffer severe mental harm if she had to carry a baby in that condition. In Doe v. Bolton and other cases, courts have consistently ruled that such a woman should not be forced to carry her child to term, but under the Daschle amendment she would not have a choice. Another problem is that the amendment would only apply to health conditions caused by the pregnancy. A woman who developed an unrelated problem during a pregnancy that left untreated could cripple her for life would not be allowed to seek an abortion because of that problem. The Daschle amendment is harmful and should be rejected.